FILED

MAY 24 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEANDRE MUR, Petitioner - Appellant, v. HIGH DESERT STATE PRISON; et al., Respondents - Appellees.	No. 04-17055 D.C. No. CV-00-02382-WBS MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Submitted May 15, 2006**

Before: B. FLETCHER, TROTT, and CALLAHAN, Circuit Judges.

California state prisoner Deandre Mur appeals pro se from the district court's judgment denying his 28 U.S.C. § 2254 petition challenging his conviction for assault with a semiautomatic firearm. We have jurisdiction under 28 U.S.C.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

§ 2253. We review de novo the district court's denial of a habeas petition, *Mendez v. Small*, 298 F.3d 1154, 1157-58 (9th Cir. 2002), and we affirm.

Mur first contends that there was insufficient evidence to support his conviction of assault with a semiautomatic firearm. We are not persuaded. After reviewing the record, we conclude that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Next, Mur contends that the trial court's failure to instruct the jury *sua sponte* on the definition of "semiautomatic firearm" violated his right to a fair trial. We disagree. Given that (1) the weapons were in the courtroom for the jury's inspection, (2) witnesses referred to the weapons as semiautomatics without objection by either co-defendant, and (3) the jurors did not seek any clarification of the term, the trial court's failure to *sua sponte* define "semiautomatic firearm" does not appear to have "so infected the entire trial that the resulting conviction violates due process." *See Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).

Finally, Mur contends that the trial court erred when it refused to instruct the jury on the lesser included offense of assault with a firearm. Even assuming that this claim is exhausted, we deny it on the merits. *See* 8 U.S.C. § 2254(b)(2); *see also Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005) ("We now join our

sister circuits . . . and hold that a federal court may deny an unexhausted petition on the merits only when it is perfectly clear that the applicant does not raise even a colorable federal claim."). In *Solis v. Garcia*, 219 F.3d 922, 929 (9th Cir. 2000), this court held that contentions regarding a state court's failure to instruct on a lesser included offense in a non-capital case will not be considered on federal habeas review because the contention fails to present a federal constitutional claim, and that the court is barred from changing the law regarding failure to instruct errors in the context of a habeas petition by the Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989). Accordingly, this claim provides no grounds for relief.

To the extent that Mur's brief raises uncertified issues, we construe his arguments as a motion to expand the certificate of appealability, and we deny the motion. *See Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam); 9th Cir. R. 22-1(e).

AFFIRMED.